

NO. 21593 ✓

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of

TITLE INSURANCE AND TRUST COMPANY,
SAN BERNARDINO COUNTY, CALIFORNIA,
and THE INTERNATIONAL COMPANY, a
partnership composed of DAVID
SALYER, CHARLES L. GOLDING and
HENRY DYE,

Appellants,

vs.

WILLIAM G. FOWLER, as Trustee of
GUARANTY TRUST DEED CORPORATION,
Debtor, in Reorganization Pro-
ceedings Under Chapter X of the
Act of Congress Relating to
Bankruptcy,

Appellee.

Appeal from the United States District Court for the
Central District of California

PETITION FOR REHEARING and

MEMORANDUM OF POINTS AND AUTHORITIES

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PETITION FOR REHEARING

The appellee above-named respectfully petitions this
honorable Court for a rehearing of the appeal in the above
entitled cause and in support of this petition represents to
the Court as follows.

This petition is addressed to three features of the decision wherein it is believed that the court may be convinced that its result is based upon the application of incorrect legal principles.

The Court has permitted appellants to ignore the requirements of Title 11, U.S.C. Sec. 87(c) under which a party must first exhaust his remedy below by filing a petition for review by a Judge of the United States District Court and appeal directly to the United States Court of Appeals.

Appellants perpetrated a fraud on this Honorable Court by asserting that a petition for review had been filed when the Transcript of Record, containing all of the pleadings related to this matter demonstrates the fact that no such document was ever filed. Moreover, if a petition for review had indeed been filed, a Certificate of Review would have been filed by the Referee in Bankruptcy pursuant to Rule 204, Rules of the U. S. District Court for the Central District of California and a hearing held before the Honorable Jesse Curtis, the judge assigned to this particular bankruptcy matter. No such certificate was filed nor was any hearing held.

Appellants assertion that this Honorable Court had jurisdiction under Title 28, U.S.C. Section 1291 is patently false since there has never been a final decision in the court below.

The court erred in its determination that the appellant

buyers repudiated their contract on October 7, 1984, the last day before the performance date. Trustee's Exhibit G-1, which is part of the Transcript of Record, is a photocopy of a letter dated October 7, 1984 from The International Company to Title Insurance and Trust Company. The letter bears a receipt stamp of October 9, 1984. The law is well established that notification of rejection, repudiation or revocation of a contract is only affected when actual notice is received, not when the repudiation, rejection or revocation letter is composed, or even when such letter is posted. The repudiation of the contract and the purported rejection of title by the appellant buyers took place when Title Insurance and Trust Company received actual notice thereof which, according to the receipt stamp on Exhibit G-1, was October 9, 1984. This was the day after the performance date and too late. Any so called rejection of title must necessarily have been timely to preserve any rights of appellants.

The court erred in its determination that the conflict in the evidence as to whether there were oral objections to title were not resolved by the Referee. The Findings of Fact (CF12) stating that The International Company without cause repudiated its contract to purchase the property and failed to comply with the escrow instructions and that Guaranty Trust Dead Corporation fully complied with the terms of the contract and the escrow instructions is the resolution of any such conflict. Where there is substantial

evidence to support it, this Honorable Court is bound by the factual determination of the trier of fact.

For the foregoing reasons, this petition for rehearing should be granted.

Dated: February 7, 1964.

Respectfully submitted,

WILLIAM G. FOWLER, Trustee
of GUARANTY TRUST DEED
CORPORATION

By Welburn S. Mayoek
WELBURN S. MAYOOCK
His Attorney

Appellee

MEMORANDUM OF POINTS AND AUTHORITIES

1. The decision ignores the requirements of Title 11, U.S.C. Sec. 67(c) which holds that a party must exhaust his administrative remedy prior to appeal from the courts.

The record demonstrates that no petition for review was filed. The assertion of appellants to the contrary is false. The record shows no such petition for review and no certificate of review, both of which would have been necessary pursuant to Rule 704, Rules of the U. S. District Court for the Central District of California. No such certificate was filed or any hearing held.

Appellants assertion that the Honorable Court had jurisdiction under Title 28, U.S.C. §1291 is untrue. There is not now nor has there ever been a final decision in the court below. Jurisdiction to hear the appeal cannot be affirmed by the false assertion that administrative remedies have been complied with.

2. The court relied upon Exhibit G-1 as the basis of its ruling and judgment on appeal deducing from this exhibit that appellants had made a timely repudiation of its contract to purchase as set forth in the escrow instructions.

In re notice:

As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required.

Stockton Automobile Co. v. Confer, 154 Cal 402

It may be broadly stated that where a statute or contract requires the giving of notice and there is nothing in the context or circumstances to show that any other form of notice was intended, personal notice is required. This is true because the law always favors a personal notice; it countenances substituted and constructive notices only as a matter of necessity or of extreme expediency.

70 Cal Jur, Sec. 11, page 243

It is true that personal notice can be given by mailing in which event proof that it was received must be made and notice is effective upon the delivery and becomes personal service upon such delivery.

Weinlen v. Heilbron, 24 Cal 636

The delivery of notice through the personal agency the sender selects could be an express company, a messenger service or the postal service. When any of these methods are used, it is the receipt of the document and not the date of its transmittal that constitutes the personal service required.

Weinlen v. Heilbron, 24 Cal 636, cited supra

The proof of service here is Exhibit G-1. It shows that it is a photocopy of a letter dated October 7, 1964. No mailing date is given. The exhibit, however, bears a receipt stamp of October 9, 1964. This is the only evidence before the Court as to the date of receipt. This shows it was

received on October 1, 1964 this shows it was effective as notice two days late and constitutes no notice at all of repudiation because the act under the contract which the notice purports to repudiate should have been performed by the appellants two days before their personal service became effective.

2. In re conflict of evidence

It is stated that the conflict of evidence upon which the court based its ruling was not resolved. The court failed to take into consideration the findings of fact and conclusions of law of the Referee. Were the conflict was resolved and such resolution is binding upon the Appellate Court. Upon proper deduction of such findings of fact, it shows that The International Company sought to repudiate its contract to purchase the property by notice of repudiation. The evidence shows that no legal notice of repudiation was given. The findings show that Guaranty Trust Deed Corporation fully complied with the terms of the contract and the escrow instructions.

The errors above shown require a rehearing and an ultimate dismissal of the appeal.

Respectfully submitted,

WILLIAM G. FOWLER, Trustee
of GUARANTY TRUST DEED
CORPORATION

by Walter E. Haycock
WALTER E. HAYOCK
his Attorney

Appellee

